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Supreme Court, U.S.
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No. 96-1398

In The

Supreme Court of the United States

October Term, 1996

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC.,

Petitioner,

vs.

BOTELHO SHIPPING CORP., ASEAN CHARTERING CO., LTD., FAIRMONT SHIPPING (H.K.) LTD., and SINGCO MARITIME S.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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A. REPLY TO RESPONDENTS' CONTENTION THAT THERE IS NO CONFLICT AMONG THE CIRCUITS

Respondents say there is no conflict in the circuits on the issue presented for review,[1] but their claim that the Second, Fourth and Sixth Circuits apply the bright-line *Robins*[2] rule is contradicted by those courts' decisions and by the legal commentators who discern in them a circuit conflict.

In the *Journal of Maritime Law & Commerce*, the leading periodical in the field of admiralty and maritime law, David R. Owen, a former president of the Maritime Law Association of the United States, discussing the majority's *Robins* bright-line rule, explained that "[o]ther circuits have rejected the bright line *per se* approach as not mandated by *Robins*. They have limited liability by a case-by-case application of traditional tort criteria of foreseeability, proximate cause, remoteness, etc."[3] Owen analyzed the Second Circuit's rejection of *Robins* as a bar to economic recovery in *In re Kinsman Transit Co.*,[4] a case that "has been of far-reaching importance on the theory of recovery for economic loss."[5] This importance derives from the fact that "[t]wo other circuits have expressly adopted the *Kinsman* approach"[6] and that "*Kinsman* has become the central rallying point for those who dislike the bright line approach."[7] Owen discussed the express

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[1] Brief in Opposition ("Opp. Brief") at 5-12.

[2] Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

[3] David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COMM. 157, 166 (1987).

[4] 388 F.2d 821 (2d Cir. 1968); Owen, *supra* note 3, at 166-68.

[5] Owen, *supra* note 3, at 166.

[6] *Id.* at 168.

[7] *Id.* at 167 (citing the dissenting opinions in Getty Rfg. & Mktg. Co. v. MT FADI B, 766 F.2d 829, 836 (3d Cir. 1985) (2-1

adoption of the *Kinsman* approach by the Sixth Circuit in *In re Bethlehem Steel Corp.*[8] and by the Fourth Circuit in *Venore Transportation Co. v. M/V STRUMA*[9] and *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries.*[10]

Writing in the *University of San Francisco Maritime Law Journal*, Francis J. Gonynor analyzed the Second Circuit's rejection of *Robins* in *Kinsman*,[11] and explained that "[t]he Fourth and Sixth Circuits on several occasions have taken the opportunity to adopt the *Kinsman* approach in handling analogous situations. . . . [12] Explaining that "[t]here is now a clear split in the United States circuit courts of appeals on how to address the issue,"[13] another commentator summarized the conflict: "The First, Third, Fifth and Eleventh Circuits construe Robins to bar recovery for all economic loss. . . . The Second, Fourth, Sixth and Ninth Circuits construe Robins to allow recovery for economic loss if the losses are sufficiently direct."[14]

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decision) (Mansmann, J., dissenting) and in Louisiana *ex rel.* Guste v. M/V TESTBANK, 752 F.2d 1019, 1035 (5th Cir. 1985) (en banc) (10-5 decision) (Wisdom, J., dissenting); and other cases).

[8] 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); Owen, *supra* note 3, at 168-69.

[9] 583 F.2d 708 (4th Cir. 1978); Owen, *supra* note 3, at 169.

[10] 638 F.2d 700 (4th Cir. 1981); Owen, *supra* note 3, at 170.

[11] Francis J. Gonynor, *The* Robins Dry Dock *Rule: Is the "Bright Line" Fading?*, 4 U.S.F. MAR. L.J. 85, 89-91 (1992).

[12] Gonynor, *supra* note 11, at 90 (citing *Marine Nav.* (4th Circuit) and *Bethlehem Steel* (Sixth Circuit).

[13] James W. Shephard, *The Murky Waters of* Robins Dry Dock: *A Comparative Analysis of Economic Loss in Maritime Law*, 60 TUL. L. REV. 995, 1010-11 (1986).

[14] *Id.* at 1011 n.88. This was written ten years before the Ninth Circuit reversed itself in Channel Star Excursions, Inc. v. Southern Pac. Transp. Co., 77 F.3d 1135 (9th Cir. 1996).

Respondents cite no decision of the Second, Fourth or Sixth Circuits that rejects the *Kinsman* approach and prohibits all claims for economic loss. *The MARATHONIAN*,[15] decided by the Second Circuit seven years after *Kinsman*, does not overrule *Kinsman*. *The MARATHONIAN* noted that the district court had "reluctantly" dismissed a time-charterer's claim based on *Robins*,[16] and for itself said: "If free to do so, we might question whether at least the damage to the principal time charterer is not so reasonably to be expected as to justify recovery,"[17] citing *Kinsman*.[18] The panel considered the time-charterer's claim identical to that of the time-charterer in *Robins*: "The first claim is somewhat more substantial, for the basis for denial of relief to the time charterer in *Robins* has come under strong scholarly criticism."[19] This is why the court considered *Robins*, "which denied relief for damages sustained by a time charterer,"[20] rather than *Kinsman*, controlling.

The MARATHONIAN followed *Robins* because it was a time-charterer case. The panel did not reject or overrule *Kinsman*, but expressed the Second Circuit's conviction that *Robins* is a mistake that should be remedied: "If free to do so. . . . "[21] The panel decided it was not free to allow the time-charterer a recovery because *Robins* could be overruled only by this Court: "In any case, 'the Supreme

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[15] Federal Comm. & Nav. Co. v. M/V MARATHONIAN, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

[16] *Id.* at 907.

[17] *Id.* at 908.

[18] 388 F.2d at 823-24.

[19] 528 F.2d at 908 (citing F. James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, 55-57 (1972); F. Harper & F. James, THE LAW OF TORTS § 6.10 at 501-05 (1956); and W.L. PROSSER, LAW OF TORTS § 129, at 939, 940 (4th ed. 1971)).

[20] 528 F.2d at 907.

[21] *Id.* at 908.

Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom.'"[22]

B. REPLY TO RESPONDENTS' CHARACTERIZATION OF THIS COURT'S DECISIONS IN *EAST RIVER* AND *THE SUCARSECO*

This Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*[23] expressly reserved decision of the issue presented for review,[24] and thus is not a basis for denying this petition, as respondents claim.[25]

Respondents characterize the "damages" paid by cargo in *The SUCARSECO*[26] as collision damages, emphasizing the presence of physical damage.[27] But the physical damage that triggered the cargo owners' payment of general average contributions was not damage to their cargoes, but to the carrying vessel, *which they did not own*. *The SUCARSECO* allowed recovery of purely economic losses (the cargo owners' general average contributions) although the losses were caused by damage to someone else's property. Moreover, the cargo owners paid the general average contributions under a clause in the carrier's bill of lading that required cargo to contribute to the cost of repairing the ship should it be damaged during the

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[22] *Id.* (quoting Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

[23] 476 U.S. 858 (1986).

[24] *Id.* at 871 n.6.

[25] Opp. Brief at 12-15.

[26] Aktieselskabet Cuzco v. The SUCARSECO, 294 U.S. 394 (1935).

[27] *Id.* at 16.

voyage.[28] Since the cargo owners suffered economic losses absent physical damage to their own property as the result of a negligent interference with contract, the only way to square *The SUCARESECO* with this Court's earlier *Robins* ruling is to view *Robins*, as *The SUCARSECO* did, as a case turning on the *remoteness* of the loss[29] rather than on physical damage to a proprietary interest or negligent interference with contract.

C. REPLY TO RESPONDENTS' "STRINGENT" READING OF *ROBINS*

Respondents misstate the similarity between this case and *Robins*.[30] The two are not analogous. Unlike the ship repairer in *Robins*, respondents were in actual possession, custody and control of petitioner's property. The remoteness which this Court descried between the repairer's tort and the charterer's contract in *Robins* does not exist here. Respondents cannot claim lack of knowledge of the cargo aboard their own vessel. They knew what they had loaded, where they had loaded it, and where they were to take it. There is no *Robins* remoteness here. Petitioner is not claiming for economic damages from the loss of use of someone else's ship, as in *Robins*; it is claiming for damages caused by the loss of use of *its own property* – the wheat seed.

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[28] *Id.* at 404-05.

[29] *Id.*; *see also* Pet. for Cert. at 21.

[30] Opp. Brief at 16-17.

Respondents' citation to *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*[31] and *Cargill, Inc. v. Doxford & Sunderland, Ltd.*[32] adds nothing to the discussion. The *TEST-BANK* decision[33] required the Fifth Circuit panels in *Dreyfus* and *Cargill* to reject out-of-hand the cargo owners' claims for economic loss. It does not follow from this that *Robins* should have controlled the outcome in either case. Unlike the charterer in *Robins*, both Dreyfus and Cargill actually lost the use of their own, rather than someone else's, property. Both *Dreyfus* and *Cargill* should have been decided under *The SUCARSECO*,[34] not under *Robins*. Like the cargo owners in *The SUCARSECO*,[35] Dreyfus and Cargill should have been allowed to recover the damages they suffered when the ship carrying their goods became disabled. *Dreyfus*, *Cargill* and this case all demonstrate that many of the claims barred by the economic loss doctrine are easily distinguishable from *Robins*. Both *Robins* and the expansionist doctrine founded upon it fail to provide any intellectual apparatus for explaining why a tortfeasor should have no duty of care not to impair a person's use of *his own property*.

In asking this Court to provide an intellectual apparatus for determining claims for economic loss, petitioner is not "an overreaching plaintiff" contributing to the " 'tortification of contract law.' "[36] Petitioner simply asks this Court to recognize a cause of action for economic loss

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[31] 830 F.2d 1321 (5th Cir. 1987).

[32] 782 F.2d 496, *rehearing denied*, 785 F.2d 1296 (5th Cir. 1986).

[33] 752 F.2d 1019.

[34] 294 U.S. 394.

[35] *Id.* at 405.

[36] Opp. Brief at 19.

that was foreseeably and proximately caused by a tortfeasor's breach of duty. Petitioner does not ask this Court to reject the principle of *remoteness*, the key element in *Robins*, but on the contrary to apply it to the facts of each case, rather than reject all economic claims regardless of duty, breach, foreseeability and proximate cause.

D. REPLY TO RESPONDENTS' ESTOPPEL ARGUMENT

Respondents' contention that petitioner is barred from recovery by virtue of its negotiation of the bills of lading issued by Cormorant,[37] a defendant in the underlying action, ignores the *res judicata* effect of the district court's dismissal of respondents' counterclaim for fraud based on the dating of the bills of lading. Holding that respondents had no cause of action against petitioner for negotiating the bills of lading, the court explained: "[D]efendants should not be heard to say that they detrimentally relied on the misdescription in the dates of the bills of lading."[38] There was, the court found, no detrimental reliance on the dates in question.[39] The reference to estoppel in the district court's decision is there because respondents' counsel put it there. The court's findings and conclusions were submitted by respondents' counsel, not written by the court.[40] The issue of detrimental reliance is *res judicata*, as shown by the court's decision dismissing the counterclaims.

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[37] *Id.* at 19-20.

[38] Pet. for Cert. at App. 19-20 n.3.

[39] *Id.* "Thus, they did not rely on the misdescription in the bills of lading. . . . "

[40] *See* Pet. for Cert. at App. 38.

Moreover, the propriety of the finding (¶ 34) to which respondents refer was raised by petitioner and preserved on appeal.[41] Petitioner raised the issue that the court made numerous factual findings on damages issues, including mitigation, although it never tried the damages phase of the case.[42] It was unnecessary for the Ninth Circuit to address this issue after it ruled that petitioner's claim for economic loss was barred by law.[43] If this Court grants a writ of certiorari and overrules the court below on the issue presented for review, then the court of appeals, on remand, will have to decide whether the district court abused its discretion by making damages findings, including the finding in ¶ 34, without allowing petitioner to put on its damages case. That issue has no effect on this petition.

Respondents' apparent purpose in raising this question is to persuade this Court that there are prudential reasons for denying the petition for certiorari. Since this question was raised on appeal and pretermitted because the *Robins* ruling made decision of it unnecessary, the Ninth Circuit would be required – and hence able – to review the finding in paragraph 34 on remand. This issue is not a basis for denying this petition.

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[41] *See* the Appendix to this reply brief, which contains the applicable pages from the Brief of Appellant that petitioner filed in the court of appeals.

[42] The court of appeals recognized that the trial was bifurcated into liability and damages phases, and that the court entered judgment after petitioner rested its liability case. Pet. for Cert. at App. 4.

[43] Pet. for Cert. at App. 6.

CONCLUSION

This is not a fact-bound case, and there are no prudential reasons for denying the petition. The conflict in the circuits and particularly the 24-21 division among appellate judges deciding the issue presented for review are strong recommendations for granting the writ. The judicial and academic attention focused on the *Robins* bright-line rule demonstrate the significance of the issue. Some of the flaws in the rule were revealed in a recent article in *The Journal of Legal Studies* by Victor Goldberg, the Thomas Macioce Professor of Law and Economics and codirector of the Center for Law and Economic Studies at Columbia University.[44] According to Professor Goldberg:

> The *Robins* rule is overbroad, lumping together a number of very different problems. Many of the claims barred by the economic loss doctrine are easily distinguishable from *Robins*. Of course the *Robins* rule need not give the wrong result in other cases of economic loss, but the doctrine gives no guidance as to why liability should be denied and fails to identify cases in which denial of recovery for economic losses is the wrong outcome.[45]

Pointing out that the *Robins* case "differs fundamentally from the bulk of the cases that raise the economic loss question,"[46] Professor Goldberg concludes that "the rule has to be rethought. We require some intellectual

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[44] Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock V. Flint, 20 J. LEGAL STUD. 249 (1991).

[45] *Id.* at 249-50.

[46] *Id.* at 275. "To decide that, say, Exxon should not have to compensate Alaskan innkeepers because Robins did not have to compensate Flint is a non sequitur." *Id. Compare* Pet. for Cert. at 10, text at n.27.

apparatus for evaluating the myriad of claims for recovery of mere economic loss."[47]

Petitioner submits that the *Robins* decision and its expanded application by the First, Third, Fifth, Ninth and Eleventh Circuits have failed to provide the requisite intellectual apparatus for evaluating economic claims. This Court can, and should, provide this apparatus by taking up, on this petition, the issue reserved in *East River*: whether a tort cause of action can be stated in admiralty if the only damages sought are economic. This case is particularly well-suited for the decision of this issue because, unlike the time-charterer in *Robins*, petitioner is claiming for the loss of use of its own property. This case would thus permit this Court the full range of possible outcomes, from endorsing the expansion of *Robins* to overruling *Robins* and the cases based upon it, including the middle approach of draw the line at proprietary interest rather than physical damage. The facts of this case would enable this Court to allow economic recovery for the loss of use of one's own property while retaining the *Robins* bar in the absence of a proprietary interest.

DATED: April 11, 1997

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[47] Goldberg, *supra* note 44, at 275.

APPENDIX

ISSUE III: THE COURT RULED ON DAMAGES WITHOUT TRIAL OF DAMAGES

The district court ordered the trial bifurcated (RE 3, ll. 22-25), with damages to be tried only after a determination that defendants were liable. The eight days of trial were devoted exclusively to the liability phase of the case. As a result, the only evidence relating to damages which the bifurcation order allowed plaintiff to put on was evidence showing the categories of damages claimed, so the court could decide the *Robins Dry Dock* issue that defendants had raised repeatedly throughout the six years of this case. Despite the bifurcation, the court made findings that the damages evidence was inadequate and the costs incurred by National Seed to cover for the delayed delivery were unreasonable or unnecessary.

Because of the bifurcation order, all these damages findings were erroneous. The court erred in making findings of any kind with respect to the reasonableness of National Seed's efforts to mitigate its damages by buying grain in the Saudi market and converting it to wheat seed to cover its contracts for the tonnage that would be arriving too late aboard the M/V SINGAPORE VICTORY. All of National Seed's decisions and actions in this respect are matters of *quantum* and *mitigation*. Even the court's finding in RE 43, ¶ 38 that the import deadline was extended to December 20, 1988 – a finding which ignores the fact that the Kingdom of Saudi Arabia granted this extension as an alternative to letting the 10,000 late-delivered tons of wheat seed rot on the dock –

goes to the question of whether the damages were reasonable in the circumstances, a question the court could not decide unless it first permitted trial of the damages phase of the case.

In making findings about damages, the court ignored its bifurcation order, which ordered plaintiff *not* to put on any evidence of reasonableness or mitigation in the liability phase of the trial. Counsel reminded the court of the bifurcation order shortly before the court stated its reasons orally for dismissing the entire complaint. When the court commented that some damages evidence had been heard through the deposition of the general manager of National Seed, counsel explained that the only damages evidence put on in the liability phase of the trial was evidence to establish the "categories of damage" sustained by National Seed. *See* TR, Feb. 16, 29/6 - 31/11. The purpose of demonstrating the categories of damages was to show *causation*, not quantum, and certainly not mitigation. At that point, the court acknowledged the bifurcation order, assuring counsel that:

> In the findings I will now articulate – damages will not be discussed except, perhaps, I might allude to the – I will allude to the assignment, and I might allude to the evidence of National's claims. But I say this, knowing full well that damages – somewhere in the distant remote past we bifurcated damages from liability. Yes, I thank you for bringing that to my attention. But I, too, became aware of the problems that emerged, because of some of the comments I made about lack of evidence and damage.

TR, Feb. 16, 30/25 - 31/9.

Despite the recognition that damages were not to be tried in this phase of the trial, the court went on to make numerous damages findings. *See* RE 38-40, ¶¶ 20, 21, 22, 23, 24, and 34, and RE 43-44, ¶¶ 36, 38 and 39, of the Findings of Fact and Conclusions of Law. In some of those findings, the court – incredibly – went so far as to say that no evidence was presented on particular damages issues! *See* RE 38, ¶¶ 20 and 22. Findings of Fact ¶¶ 20, 21, 22, 23, 24, 34, 36, 38 and 39 were made without allowing plaintiff to try damages, a clear abuse of discretion.

These findings should also be reversed because the court, in effect, required the plaintiff to bear the burden of proof on mitigation, a patent legal error. The burden falls squarely on the defendant to prove failure to mitigate. *Alexander v. Menlo Park*, 787 F.2d 1371, 1375 (9th Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S. Ct. 879, 93 L. Ed. 2d 833 (1987). *See also Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593-94 (6th Cir. 1986). The burden is also on the defendant to show that the plaintiff "failed to exercise reasonable business prudence" in reacting to a loss. *United States v. Harris*, 100 F.2d 268, 279 (1938), *reh'g denied*, 103 F.2d 1020 (9th Cir. 1939). Without permitting trial of damages, the court held that appellant had not carried appellees' burdens.